Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

COURT OF APPEALS
NO. 76-3131

76-1553

JOSEPH FINAN, d/b/a House of Kawasaki
and also d/b/a Cycle World,

Petitioner,

vs.

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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725 East Kennedy Boulevard
Tampa, Florida 33602
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IN THE

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COURT OF APPEALS
NO. 76-3131

JOSEPH FINAN, d/b/a House of Kawasaki
and also d/b/a Cycle World,

Petitioner,

vs.

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 4, 1977.

OINION BELOW

The Order of the Court of Appeals and the Order Denying Petitioner's Suggesting for Rehearing en banc are set out in the Appendix, *infra,* pages A 7, A-19 and have not been officially reported.

JURISDICTION

On December 8, 1976, the Honorable Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, by Claire F. Sachs, Deputy Clerk, dismissed the Appeal herein for want of prose-

cution for failure of Appellant to file his Brief pursuant to Rule 9(b)(2), Local Rule of the aforesaid Court of Appeals. Thereafter, by Order dated January 3, 1977, the United States Court of Appeals for the Fifth Circuit denied Appellant's Motion for Leave to Reinstate the Appeal and by Order dated February 4, 1977, denied Appellant's Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C., S.Ct. R. 19(1) and (b).

QUESTION PRESENTED

Whether the actions of the United States Court of Appeals for the Fifth Circuit in dismissing the Appeal herein for want of prosecution and in refusing to reinstate said Appeal and/or grant a rehearing en banc in connection with the Motion for Reinstatement of said Appeal constitutes the rendition by said Court of a decision in conflict with the decision of other courts of appeals on the same subject matter; further, whether said Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court, since said Court of Appeals has departed from the usual judicial proceedings requiring this Court to exercise its supervisory power and grant the relief herein sought?

STATEMENT

Suit was brought in the United States District Court for the Middle District of Florida, Tampa Division, by Kawasaki Motors Corporation, U.S.A., a Delaware corporation. These proceedings were initiated by virtue of a Complaint filed against Petitioner, contending that the trial court had jurisdiction in accordance with the provisions of 15 U.S.C. Sec. 1121. The Complaint contended that Petitioner and Respondent on December 29, 1971, entered into a Kawasaki Motorcycle Authorized Dealer Sales and Service Agreement; that Respondent was the owner of certain trademarks, registered trademarks and service marks, including the word Kawasaki; that the Kawasaki Motorcycle Authorized Dealer Sales and Service Agreement had been terminated; and notwithstanding said termination, the Petitioner continued to display "Kawasaki" signs and use that name in connection with his advertising. Respondant contended that the actions of Petitioner constituted an infringement on its registered marks and sought injunctive relief.

In response to said Complaint, Petitioner filed an Answer, Defenses and Counterclaim. Petitioner denied the material allegations of the Complaint and counterclaimed for affirmative relief in the form of monetary damages and injunctive relief. The Counterclaim contended, among other things, that Petitioner became Respondent's exclusive Kawasaki Motors Corporation's dealership in Hillsborough County, Florida, as a consequence of an oral agreement between the representative of said parties, and that pursuant to said agreement, Petitioner invested substantial sums of money to open the dealership in question, provided furnishings and fixtures and advertised the products of Respondent. The Counterclaim further alleged that the actions and conduct of Respondent violated Florida Statutes 320.64 and 320.641, and as a consequence, Petitioner sought damages equal to three times his pecuniary losses, together with costs and attorneys' fees.

The allegations of the Counterclaim and the denial of said material allegations submitted by Respondent proceeded to trial before a jury at the same time that

the Court considered the non-jury issues raised by the original Complaint. At the conclusion of the trial which lasted in excess of five days, the Court directed a verdict in favor of Respondent and against Petitioner on all issues. A timely Notice of Appeal was filed with the United States Court of Appeals for the Fifth Circuit.

The record of the trial proceedings was transcribed by the Court Reporter and that record, together with the necessary appropriate documentary evidence, was promptly and duly filed with the Clerk of the United States Court of Appeals for the Fifth Circuit.

On or about October 11, 1976, counsel for Petitioner herein moved the Court of Appeals for a 30-day extension of time within which to file Appellant's Brief. As grounds for said motion, Petitioner set forth the fact that the issues raised are complex and required extensive research of the law of the State of Florida and at least 10 other states that have statutes comparable to the Florida Statute upon which the Counterclaim was based in order to obtain precedent for the interpretation of the Florida Statute, which statutory interpretation in Florida was imprecise. In addition thereto, counsel had been involved in several significant civil and criminal trials which consumed a considerable amount of his time that would have otherwise been devoted to the preparation of the Brief in question. Lastly, counsel advised the Court that prior to the time that Appellant's Brief was due to be filed, his monther-in-law was scheduled to undergo ovarian cancer surgery at Anderson Medical Center, Houston, Texas, which would require his appearance there. The aforesaid motion further recited that Respondents' counsel had no objection to the extension of time sought. (A-1 - A-4)

Based upon the aforesaid motion, an order was entered by the Court of Appeals extending the time within which Petitioner was to file his Brief until November 11, 1976.

On November 2, 1976, Petitioner's attorney filed a motion to extend the time to file Appellant's Brief with the Fifth Circuit Court of Appeals beyond the extension previously granted and recited that Appellant's undersigned attorney was scheduled to appear before the Honorable George C. Young, Chief Judge, Middle District of Florida, in the criminal case of *U.S.A. v. John A. Geders* on November 22, 1976, but because of the early termination of the case of *U.S.A. v. Edward Gurney,* a case that was being tried in Orlando, Florida, by Judge Young, the said Honorable George C. Young ordered the trial in *U.S.A. v. Geders* to begin on November 1, 1976. The *Geders* case was a retrial of a marijuana importation conspiracy case that had previously been tried and the conviction reversed by this Court. The first trial took 10 days, and it was anticipated that the retrial would take at least as long. Although Petitioner's counsel was diligently working on the preparation of Petitioner's Brief, said Brief had not been completed and could not be completed on or before November 11, 1976, and Petitioner's counsel sought a brief extension for filing of said Brief up to and including November 29, 1976, which motion was granted by the Court. (A-4 - A-6)

Counsel proceeded to trial in the *Geders* case, which trial consumed more time than was anticipated; and during the evening hours and on weekends, counsel attempted to complete Petitioner's Brief for filing with the United States Court of Appeals for the Fifth Cir-

cuit. The said Brief was completed and forwarded to the Court of Appeals on December 6, 1976, and received by the Clerk of said Court on December 9, 1976. (A-8, A-8a)

By Order dated December 8, 1976, the Clerk of the United States Court of Appeals for the Fifth Circuit, pursuant to Rule 9(b)(2), dismissed Petitioner's Appeal for want of prosecution, irrespective of the fact that Appellant's Brief was mailed prior to the entry of the Order of Dismissal and obviously crossed the Order of Dismissal in the mails. (A-7)

The Court of Appeals rejected Petitioner's Request for Reinstatement and Petition for Rehearing and Suggestion for Rehearing En Banc. (A-9 - A-19)

REASONS FOR GRANTING THE WRIT

The case of the instant Petitioner presents a very important and significant issue relating to a conflict between the decision of the United States Court of Appeals and the decisions of other Courts of Appeals in the same factual setting, which important question of law has not been but should be settled by this Court, particularly where the Court of Appeals has significantly departed from the usual and customary judicial practices that require this Court to exercise its supervisory powers. If the dismissal of Petitioner's Appeal herein without any showing of lack of diligence or bad faith is permitted to stand, especially when there are significant and substantial issues presented to the Court for consideration, then Petitioner's rights to due process of law, equal protection of the law and access to the courts for resolution of justiciable issues will be violated. This is particularly the case where Petitioner himself is a pawn in the controversy between courts

and litigants relating to crowded trial calendars and appellate dockets and is guilty of no wrongdoing. Petitioner respectfully submits that specific and meaningful guidelines must be set forth and defined in order to avoid the perfunctory abrogation of cherished rights of litigants. Although the jurisdiction of federal courts is limited by the Constitution and congressional enactments, the concept found in Paragraph 40 of the Magna Carta that the courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay is the touchstone of our constitutional form of government and judicial system.

The right of a litigant to appellant review of a final decision of a district court is provided for in 28 U.S.C. Sec. 1291.

The Courts of Appeals have authority to make rules governing their respective practices, so long as such rules are not inconsistent with the Federal Rules of Appellate Procedure as promugated by this Court. Fed. R. App. P.47; see also 9 *Moore's Federal Practice* §247.02 at 4702 (2d Ed. 1977).

Congress has exercised its power under the Constitution to establish courts inferior to the Supreme Court and regulate their business. Congress has provided that this Court and all other courts established by it may prescribe rules to conduct their business. Such rules must be consistent with the acts of Congress and rules of procedure prescribed by this Court. 28 U.S.C.A. §2071 (1976).

The United States Court of Appeals for the Fifth Circuit promulgated Local Rule 9(b)(2) which provides as follows:

> "In all other appeals (docketed or undocketed) when an appellant fails to timely file the record (or appendix) or fails to file a brief or otherwise fails to comply with rules requiring processing the appeal to hearing, the clerk shall enter an order dismissing the appeal for want of prosecution"

The rule promulgated by this Court relating to the consequences of failure to timely file an appellant's Brief is set out in Rule 31(c), Federal Rules of Appellate Procedure as follows:

> "Consequences of failure to file briefs. If an appellant fails to file his brief within the time provided by this rule, *an appellee may move for dismissal of the appeal.*" (Emphasis added)

Parenthetically, Appellee never moved to dismiss the Appeal nor did it object to the untimely filing of Appellant's Brief with the United States Court of Appeals for the Fifth Circuit. Petitioner does recognize that the inaction on the part of Appellee (Respondent) is not dispositive of the issue herein, but it certainly bears upon the propriety of the actions of the United States Court of Appeals for the Fifth Circuit as hereinabove set out. The rule of this Court is clearly couched in discretionary terms, and even when Appellee files a Notice to Dismiss under the rule, the appellate court is not required to grant said motion; and on any number of occasions, it has denied a Rule 31(c) Motion. *Daugherty v. United States,* 453 F.2d 899 (6th Cir. 1972), and *King v. Laborers International's Union of North America,* 443 F.2d 273 (6th Cir. 1971). When unusual circumstances prevented defendant's attorney from devoting his time to the preparation of appellant's Brief, the Court of Appeals for the Second Circuit, after a dismissal of an appeal, reinstated appellant's appeal

and accepted a belatedly filed brief and disposed of the appeal on its merits. *United States v. Edwards,* 366 F.2d 853 (2nd Cir. 1966).

The Fourth Circuit Court of Appeals determined that it was improper to dismiss an important case because of the failure of appellant's attorney to file a Brief within the time required, and it permitted the case to proceed in the appellate court ultimately for disposition on its merits. *International Broth. of Teamsters, Chauffers, Warehousemen and Helpers of America v. U.S.,* 272 F.2d 11 (4th Cir. 1959).

The conflicts between the handling of the factual situation herein by the various Courts of Appeals has created a quagmire and substantial uncertainty on a significant and important issue relating to the preservation of the rights of litigants during the appellate process.

In *Alley v. Dodge Hotel,* 501 F.2d 880 (D.C. Cir. 1974), the Court in dealing with the jurisdictional issue of the filing of a Notice of Appeal held as follows:

> "Since timeliness in noticing appeals is 'mandatory and jurisdictional', compliance with applicable requirements 'is of the utmost importance.' Certainly a scrupulous satisfaction of the formal specifications of rules governing appeals is good practice and good sense; indeed, some courts have demanded strict performance by would-be appellants. But it is clear beyond cavil that Appellate Rules 3 and 4 tolerate a common sense approach to timely filing, and do not insist upon 'literal compliance in cases in which it cannot fairly be exacted . . .' We think a filing requirement is met by a positive, substantial and unequivocal effort to discharge it, and that innocuous irregularities incidental to such an en-

deavor should be disregarded when considerations of fairness dictate that course. We agree with the fifth circuit that 'it would . . . be a hearkening back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by (rules) is itself a Mumbo Jumbo, and that the failure to comply formalistically with (them) defeats substantial right." (Footnote references omitted.)

In the case of *C-Thru Products, Inc. v. Uniflex, Inc.*, 397 F.2d 952 (2nd Cir. 1968), where the appellate court dealt with the jurisdictional question of the timeliness of the filing of a Notice of Appeal and an extension predicated upon excusable neglect held that:

". . . The time limitation is intended to set a period on which parties may rely for required action by a litigant, not to dragoon a busy trial court into hasty and ill-considered action by the risk of construction of appellate rights if the court does not meet the fixed deadline."

It is clear from an examination of Local Rule 9(b)(2) of the Fifth Circuit Court of Appeals that it is a rule of practice in criminal cases, although that court has applied it and extended it to civil cases and has dismissed civil cases for want of prosecution, citing as authority the aforesaid rule. Both the Eighth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have local rules similar to the rule in question here, said rules being Rule 13 and Rule 19(b), respectively.

It is submitted that a clear conflict exists between the Local Rule of the Fifth Circuit in question and the federal appellate rules promulgated by this Court, and with the provisions of Federal Rule of Appellate Pro-

cedure 47, and the provisions of 28 U.S.C.A. §2071 (1976), accordingly, the Local Rule must be declared invalid or certainly inapplicable to the factual setting herein, since access to the courts is a fundamental due process right. A deprivation of a litigant's right to access to court by the Local Rule in question requires this Court to exercise its supervisory power and direct the reinstatement of the Appeal in question.

This Court in an analogous situation, irrespective of the adoption of procedural rules relating to the conduct of this Court's business and the requirements for the timely filing of a Petition for Writ of Certioari, has permitted the untimely filing of such a petition in order to avoid injustice and permit the disposition of significant issues on their merits. *Schacth v. United States*, 398 U.S. 58, 64 (1970).

Petitioner submits that he has in good faith complied with the requirements of Rules of Appellate Procedure herein and that the dismissal of the proceedings in question constitutes a violation of his rights as hereinabove set out and arbitrary and capricious actions on the part of the United States Court of Appeals for the Fifth Circuit.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

ARNOLD D. LEVINE
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Peter J. Winders, Esq., P. O. Box 3239, Tampa, Florida 33601, Attorney for Respondent, this ____ day of May, 1977.

Arnold D. Levine

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH FINAN, d/b/a House of Kawasaki
and also d/b/a Cycle World,

Petitioner,

vs.

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARNOLD D. LEVINE
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725 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-6585

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
NEW ORLEANS LOUSIANA

No. 76-3131

JOSEPH A. FINAN, d/b/a House of Kwasaki,
Appellant,
vs.
KAWASAKI MOTORS CORPORATION,
Appellee.

MOTION FOR EXTENSION OF TIME
TO FILE APPELLANT'S BRIEF

Appellant, by his undersigned attorney, does hereby move this Court to extend the time within which to file Appellant's Brief upon Appeal and as grounds therefor states as follows:

1. Since the preparation and completion of the Record on Appeal, Appellant's undersigned attorney has been diligently working to prepare Appellant's Brief for timely filing herein, but the issues raised are complex and have required extensive research of the law of the State of Florida and at least 10 other States that have statutes comparable to the Florida Statute upon which the claim herein was based in order to get a precedent for the interpretation of the Florida Statute which statutory interpretation in Florida is imprecise.

2. Since the preparation and receipt of the Record on Appeal, Appellant's undersigned attorney has been involved in several significant trials which have consumed a considerable amount of his time and he has likewise been compelled to handle and dispose of proceedings in both State and Federal Courts aside from the aforesaid trial.

3. During the period of time that Appellant's counsel has had since the preparation and filing of the record to prepare for Appellant's Brief, there have been intervening religious holidays which have been observed by Appellant's counsel reducing the time available for the preparation of Appellant's Brief, and, in addition thereto, Appellant's attorney's mother-in-law has been required to undergo care and treatment for ovarian cancer at Anderson Medical Center, Houston, Texas, and has been accompanied by the undersigned. Counsel's mother-in-law is now required to undergo surgery on Thursday, October 14, 1976, which has required that Appellant's undersigned attorney assist her and make personal and business arrangements for the continuation of her business activities and her personal life, being a divorcee residing in Tampa, Florida.

4. A 30-day extension hereof would not in any way prejudice the parties hereto and Peter J. Winders, Esq., counsel for Kawasaki Motors Corporation, U.S.A., Appellee has already agreed to said continuance.

WHEREFORE, Appellant prays that this Court grant to him a 30-day continuance within which to file his Brief herein.

LEVINE, FREEDMAN &
HIRSCH, P.A.
By /s/ Arnold D. Levine
Arnold D. Levine
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Extension of Time to File Appellant's Brief has been furnished by mail to Peter J. Winders, Esq., P. O. Box 3239, Tampa, Florida, and to Paul R. Pizzo, Esq., Marine Bank Building, Tampa, Florida 33602, this 11th day of October, 1976.

/s/ Arnold D. Levine
Arnold D. Levine

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 76-3131

JOSEPH H. FINAN,
Appellant,
vs.
KAWASAKI MOTOR CORP.,
Appellee.

MOTION TO EXTEND TIME TO FILE APPELLANT'S BRIEF

JOSEPH FINAN, by his undersigned attorneys, moves this Court to extend the time within which to file Appellant's brief herein up to November 29, 1976, and as grounds therefor states as follows:

1. Appellant has heretofore been granted an extension of time to file his brief herein up until November 11, 1976.

2. Appellant's undersigned attorney was scheduled to appear before the Honorable George C. Young, Chief Judge, Middle District of Florida in the criminal case of USA v. John A. Geders, starting November 22, 1976. Because of the early termination of the case of USA v. Edward Gurney, although not scheduled to proceed to trial prior to November 22, 1976, the said Honorable George C. Young ordered that said trial should begin on November 1, 1976, on which date a jury was selected and at this point in time, evidence is proceeding.

3. The *Geders* case is a re-trial of a marijuana importation conspiracy case that had previously been tried and the conviction reversed by the Supreme Court of the United States. The first trial took ten (10) days and it is anticipated that this trial would take a like period of time.

4. Although Appellant's attorney has been diligently working on the preparation of Appellant's Brief, said brief has not been completed and cannot be completed while counsel is engaged on a full-time basis in the aforesaid criminal case.

5. The aforesaid circumstances are not attributal to any actions on the part of Appellant nor his attorney, and came about unexpectedly. This motion is not filed for the purpose of hindering or delaying these proceedings, but in good faith.

6. Counsel for Appellee has been advised of the foregoing and has no objection.

WHEREFORE, Appellant prays that this Court extend the time within which to file Appellant's brief up to and including November 29, 1976.

LEVINE, FREEDMAN &
HIRSCH, P.A.
By /s/ Arnold D. Levine
Arnold D. Levine, Esquire
725 E. Kennedy Blvd.
2nd Floor
Tampa, Florida 33602
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished by mail to Peter Winders, Esquire, Attorney for Appellee, P. O. Box 3239, Tampa, Florida 33601, this 2nd day of November, 1976.

/s/ Arnold D. Levine
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3131

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware Corporation,
Plaintiff-Appellee,
versus
JOSEPH A. FINAN, d/b/a House of Kawasaki,
and also d/b/a Cycle World,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

CLERK'S OFFICE:

Pursuant to Rule 9, paragraph (b) (2) of this court, the appeal was duly entered dismissed for want of prosecution for failure of appellant to file his brief within the time fixed by the rules, this 8th day of December, 1976.

EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit
By Clare F. Sachs
Deputy Clerk

FOR THE COURT — BY DIRECTION

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Case No. 76-3131

JOSEPH A. FINAN, d/b/a House of Kawasaki,
and also d/b/a Cycle World,
Appellant-Defendant,
vs.
KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,
Appellee-Plaintiff.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

Arnold D. Levine
Levine, Freedman & Hirsch, P.A.
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Appellant-
, Defendant

U. S. COURT OF APPEALS
RECEIVED

DEC. 9, 1976

New Orleans, La.

CONCLUSION

In conclusion, it is submitted that the Court erred in its interpretation of the appropriate Florida Statutes to the facts of this case and in directing a verdict against Appellant. The Court further erred in entering a permanent injunction against Appellant and by virtue

the oral contemporaneous inducement for the execution of the written contract constituted reversible error. thereof precluding his use of the name "Kawasaki" and in excluding admissible parol evidence and admissible evidence on the issue of damages, which errors are of such a magnitude to warrant reversal and remand for a new trial on the issues herein raised.

LEVINE, FREEDMAN & HIRSCH, P.A.
By /s/ Arnold D. Levine
Arnold D. Levine, Esquire
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant has been furnished by mail to Peter J. Winders, Esquire, Exchange National Bank Building, Tampa, Florida 33602, this 6th day of December, 1976.

Arnold D. Levine

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 76-3131

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,
Plaintiff-Appellee,
vs.
JOSEPH A. FINAN, d/b/a House of Kawasaki,
and also d/b/a Cycle World,
Defendant-Appellant.

MOTION FOR RECONSIDERATION
AND REINSTATEMENT OF APPEAL

Defendant-Appellant, by his undersigned attorneys, moves this Court to reconsider the Order of Dismissal, dated December 8, 1976, and reinstate the pending Appeal, and as grounds therefor states as follows:

1. Defendant-Appellant, after the entry of an adverse decision by the trial judge, timely filed a Notice of Appeal herein, and thereafter timely filed with the Clerk of this Court the Record on Appeal.

2. In connection with the submission of Defendant-Appellant's Brief on Appeal, Defendant-Appellant received from this Court two extensions of time to file said Appeal predicated upon the circumstances beyond the control of counsel for Defendant-Appellant unexpectedly requiring his appearance in criminal trials that precluded counsel from being available to properly and fully prepare Defendant-Appellant's Brief herein. The last extension of time for filing Defendant-Appellant's Brief was up to and including November 29, 1976.

3. Prior to November 29, 1976, the Brief of Defendant-Appellant had been partially prepared and complet-

ed when counsel was directed telephonically to appear for trial in the U.S. District Court for the Southern District of New York in the case of *United States of America v. Grace Sherman, et al.,* on Friday, December 3, 1976, at 2:00 o'clock, in which trial a jury was to be selected that afternoon, and the trial proceed Saturday, Sunday and thereafter until completed. The aforesaid telephone notification was the first notice of trial ever received in connection with said criminal matter which involved four counts of income tax evasion, the only prior notification or notice of when the trial would take place occurred at the arraignment of said Defendant in May 1976, at which time the Court announced that he would not try this case before November 1976. The aforesaid case involved hundreds of documents, and in excess of 50 witnesses whose Subpoenas had to be prepared and submitted to have said witnesses available for trial in New York on Saturday, December 4, 1976. In addition thereto, it was necessary to obtain documents in the possession of third parties and complete the interview of certain prospective Government witnesses and Defendant's witnesses all prior to December 3, 1976. Many of the Government and Defendant's witnesses lived in New York City, some lived in Washington, D.C., and others lived in Tampa, Florida, the present residence of the Defendant, and the residence of her attorney and the place where he has his office.

4. The emergency nature of the aforesaid criminal proceedings caused and required counsel to set aside the completion of Defendant-Appellant's Brief herein, which Brief would have been in typewritten form by the time allotted and required the completion of Defendant-Appellant's Brief in the late evening hours during the week of November 29, 1976.

5. Counsel for Appellee heretofore advised Defendant-Appellant's attorneys that he had no objection to a reasonable delay in the submission of Defendant-Appellant's Brief, since his client has suffered no prejudice as the result of the institution of the appellate

proceedings. Accordingly, in connection with the two specific motions filed for extension of time, the aforesaid representation was made.

6. Defendant-Appellant's Brief was completed on Monday, December 6, 1976, and the original and three type-written copies of same were mailed that day to the Court and to counsel. Since the receipt of the Brief by Appellee's counsel, there had been telephonic discussion about the preparation of the deferred Appendix, and at no time has Appellee's counsel suggested or indicated that the delay in the submission of said Brief has in any way adversely affected or prejudiced his client.

7. Defendant-Appellant's undersigned attorneys are familiar with the practice of this Court even in criminal cases where the expeditious disposition of cases is insisted upon to the granting of an extension of time up to 10 days upon a mere telephonic request, which request would then be confirmed by letter, and the provisions of Rule 9(b) (1) (aa) (bb), which provide for the untimely filing of an appellate brief upon a showing of good cause.

8. The Order of Dismissal was entered after Defendant-Appellant's Brief was mailed and said Brief was either filed with the Court prior to the entry of the Order or contemporaneous therewith.

9. The Appeal herein has been prosecuted in good faith without any intent to delay or hinder the disposition of these proceedings and irrespective of the unfavorable disposition of Defendant-Appellant's claim by the trial court, said claim warrants consideration by this Court because of the significant issues involved and the effect upon not only the parties hereto, but parties similarly situated.

WHEREFORE, Defendant-Appellate prays that

this Court reconsider the Order dated December 8, 1976, and reinstate the Appeal herein.

LEVINE, FREEDMAN & HIRSCH, P.A.
By /s/ Arnold D. Levine
Arnold D. Levine
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Reconsideration and Reinstatement of Appeal has been furnished by mail to Peter J. Winders, Esq., 610 North Florida Avenue, Tampa, Florida 33602, Attorney for Appellee-Plaintiff, this 13th day of December, 1976.

/s/ Arnold D. Levine
Arnold D. Levine

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 76-3131

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,
Plaintiff-Appellee,
vs.
JOSEPH A. FINAN, d/b/a House of Kawasaki,
and also d/b/a Cycle World,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

IT IS ORDERED that appellant's motion for leave to reinstate the appeal is Denied

Lewis R. Morgan
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 76-3131

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,
Plaintiff-Appellee,
vs.
JOSEPH A. FINAN, d/b/a House of Kawasaki,
and also d/b/a Cycle World,
Defendant-Appellant.

SUGGESTION FOR REHEARING EN BANC

Comes now the Defendant-Appellant, by his undersigned attorneys, and respectfully moves this Court to hold a rehearing en banc pursuant to Federal Rules of Appellate Procedure 35, and as grounds therefor would state:

1. That on or about the 8th day of December, 1976, the Honorable Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, by Claire F. Sachs, Deputy Clerk, dismissed this Appeal for want of prosecution for failure of Appellant to file his Brief pursuant to Rule 9, Paragraph (b)(2) of this Court.

2. That on or about the 13th day of December, 1976, the Defendant-Appellant filed his Motion for Reconsideration and Reinstatement of Appeal, setting forth therein the circumstances surrounding the failure to timely file the Brief in this cause.

3. That on or about January 3, 1977, Defendant-Appellant's Motion for Reconsideration was denied by Honorable Lewis R. Morgan, Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

4. That at no time had a motion been made pursuant to Federal Rule of Appellate Procedure (31)(c) by the Appellee for a dismissal of the Appeal as the result of Appellant's failure to file his Brief. In fact, as prevously recited in Appellant's Motion for Reinstatement of the Appeal in this cause, counsel for Appellee repeatedly took the position that he had no objection to delays in submission of Appellant's Brief since Appellee, at no time, suffered any prejudice as the result of the institution of the appellate proceedings herein and the delay in the filing of Appellant's Brief.

5. That Rule 9(b)(2) of the United States Court of Appeals for the Fifth Circuit appears to operate in derogation and in conflict with Federal Rule of Appellate Procedure 31(c).

6. That Rule 9(b)(2) of the United States Court of Appeals for the Fifth Circuit appears to be applicable only in criminal appeals, as it appears in a section of the rules dealing with habeas corpus procedures and procedures pursuant to 28 U.S.C., Section 2255 or other criminal procedures.

7. That the applicability of Rule 9(b)(2) to civil appeals is in question and is not clear from a reading of the rules, as a result of which this proceeding involves a queston of exceptional importance for the maintenance of unanimity in this Court's decisions.

8. That the Appellant in this cause should not be prejudiced by the actions of his attorney, since Appellant has expended considerable sums in connection with the proceedings in the trial court and in connection with the preparation and payment for the transcript of the proceedings in said trial court, and since the issues involved in this cause are not only significant to Appellant but to numerous other individuals similarly situated.

9. That Appellant's attorney is subject to the sanctions of this Court, in the event this Court deems

it appropriate to impose any such sanctions. Accordingly, this Court should not unduly penalize Appellant by dismissing the Appeal in this cause; it should, however, remedy any problem caused by Appellant's attorney's delay in filing of his Brief herein by imposing its sanctions upon Appellant's attorney rather than upon Appellant himself.

WHEREFORE, for the reasons stated above the Defendant-Appellant would respectfully suggest an en banc hearing in this matter.

LEVINE, FREEDMAN & HIRSCH, P.A.
by /s/ Michael J. Freedman
for Arnold D. Levine
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Suggestion for Rehearing En Banc has been furnished by mail to Peter J. Winders, Esq., Post Office Box 3239, Tampa, Florida 33601, Attorney for Appellee, this 11th day of January, 1977.

/s/ Michael J. Freedman
For Arnold D. Levine

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 76-3131

KAWASAKI MOTORS CORPORATION, U.S.A.,
a Delaware corporation,
Plaintiff-Appellee,
vs.
JOSEPH A. FINAN, d/b/a House of Kawasaki,
and also d/b/a Cycle World,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

Before AINSWORTH, MORGAN and GEE, Circuit Judge.

BY THE COURT:

IT IS ORDERED that appellant's suggestion for rehearing en banc of the Court's order denying his motion for reinstatement of his appeal, is Denied

FOR THE COURT
Lewis R. Morgan

UNITED STATES CIRCUIT JUDGE